SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 292

GRAIN HANDLING COMPANY, INC., *Petitioner*,

v.

PETER HARTNETT, REISS STEAMSHIP COMPANY, and INTERNATIONAL MILLING COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner, Grain Handling Company, Inc., respectfully prays that a writ of certiorari issue to review the opinion and judgment entered in this proceeding by the United States Court of Appeals for the Second Circuit on January 22, 1970.

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit, dated January 22, 1970, is reported at 421 F.2d 1011 and is reprinted in the Appendix hereto, p. 4a, *infra*.

JURISDICTION

The judgment of the Second Circuit, reprinted in the Appendix hereto, p. 13a, *infra*, was entered on January 22, 1970. On timely application, Mr. Justice Harlan on April 14, 1970, signed an order extending the time for filing this petition for writ of certiorari to and including June 19, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, under federal maritime law, the stevedore's warranty of workmanlike service includes a warranty that it will supply employees who will not in fact be negligent.

2. Whether, if there be such a warranty as to supplying non-negligent employees, the warranty is breached as a matter of law by a minimal amount of contributory negligence (1%) by the injured employee, so as to obligate the stevedore to indemnify fully the shipowner whose furnishing of an unseaworthy vessel was found to have contributed to the injury.

3. Whether a stevedore may be compelled, by way of indemnification, to pay 50% of the full liability when it is obligated equally with another party to indemnify the shipowner, found by the jury to be only half responsible for the injury.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT VII:—

In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

This action was brought in the District Court for the Western District of New York by the respondent Peter Hartnett. The amended complaint (App. 8-14) was bottomed jurisdictionally on the fact that the alleged accident had occurred on the navigable waters of the United States, thus making applicable the maritime jurisdiction of the District Court. This complaint sought recovery for personal injuries sustained by Hartnett on November 26, 1964. The named defendants were the other two respondents herein Reiss Steamship Company (hereinafter referred to as Reiss) and International Milling Company (hereinafter referred to as International).

At the time of the accident, Hartnett was a longshoreman employed as a member of a grain-scooping crew by the petitioner herein, Grain Handling Company, Inc. (hereinafter referred to as Grain Handling). Reiss was the owner and operator of the vessel aboard which the accident occurred, while International owned the grain elevator in Buffalo, New York, alongside which the vessel was docked at the time in question. International was also involved in directing the location of the mooring and in opening the hatches for

the discharge of the grain that was loaded aboard the vessel. International supplied the machinery and equipment necessary for unloading the grain, and Grain Handling supplied the longshoremen (known as scoopers) to move the grain, when it reached too low a level, into position to be scooped out by International's mechanical equipment.

On the day previous to the accident, all but one corner of the hold where the accident occurred had been emptied by Grain Handling scoopers. When the scoopers left the hold they used a small portable ladder to reach the starboard bulkhead ladder, which ended some five feet above the deck of the hold. On the following morning, November 26, International made the decision to continue the unloading despite a heavy rainfall, which was continuing. Hartnett, who was the first scooper to go aboard that morning, received no instructions to the contrary from his gang boss and, apparently forgetting the position of the portable ladder on the other side of the hold, descended the port side bulkhead ladder, which also ended approximately five feet above the deck of the hold. In jumping down to the deck of the hold he lost his footing and landed in an accumulation of grain and water, got up, slipped and fell again. The injury in question, involving his left foot, may have occurred when he fell the second time. App. 95, 155.

Hartnett's complaint sought recovery against Reiss and International on two counts: (1) negligence, and (2) failure to provide a seaworthy vessel. At the close of the evidence in the action against these defendants, the negligence count against Reiss was dismissed and the unseaworthiness count against International was dismissed. In returning its verdict in favor of Hart-

nett, the jury answered the following questions propounded by the District Court (App. 271-272):

1. "Was the injury to the plaintiff Peter Hartnett on November 26, 1964, caused in any way by the unseaworthiness of the ship William A. Reiss?"

Answer: "Yes."

2. "Was the injury to plaintiff Peter Hartnett on November 26, 1964, caused by the negligence of the defendant International Milling Company?

Answer: "Yes."

3. "Do you find that the plaintiff Peter Hartnett was contributorily negligent so as to cause the injury sustained by him on November 26, 1964?"

Answer: "Yes."

4. "What is the percentage figure which represents the plaintiff's own contributory negligence?"

Answer: "One per cent."

5. "What is the total amount of damages suffered by the plaintiff as a result of this accident?"

Answer: "$17,600."

Thereafter the jury began consideration of certain claims of indemnity and responsibility as among the various corporate defendants. In its amended answer, Reiss had asserted a cross-claim for indemnity against International and against Grain Handling, which had been impleaded as a third-party defendant. International, in turn, had asserted a cross-claim against Reiss and a third-party claim against Grain Handling. Finally, Grain Handling had asserted cross-claims against both Reiss and International.

Before submission to the jury of these various claims, the District Court ruled that:

(1) Reiss was entitled as a matter of law to be indemnified by Grain Handling for all sums which Reiss became obligated to pay to Hartnett, together with reasonable attorneys' fees and disbursements. In this connection, Grain Handling was held to be a stevedore, "and under the law they agree that they will carry out the work in a reasonably safe and workmanlike manner and if an injury occurs during the course of the work, then the steamship company is entitled to recover." App. 285.

(2) International, as a matter of law, was likewise held to be a stevedore. But left to the jury was the determination whether Reiss had acted in such a manner as to prevent International from performing its warranty of workmanlike service.

Upon consideration of the remaining cross-claims, the jury returned the following determinations:

(a) Reiss was found entitled to indemnity from International for all sums which Reiss became obligated to pay to Hartnett, together with Reiss' reasonable attorney fees and disbursements. This determination was presumably premised on the same factors that had earlier led the jury to conclude that Hartnett's injury was caused by the negligence of International. Such factors included International's responsibility for the absence of a portable ladder at the foot of the bulkhead ladder and its responsibility for ordering or permitting the vessel to be unloaded in the rain.

(b) As to the cross-claims between International and Grain Handling as to which was primarily liable vis a vis themselves for the injuries to Hartnett, the jury found that they were "jointly responsible." App. 308. This determination was reached after the jury had re-

ported itself split on the question of which was primarily responsible, App. 302, but that "If we could split the blame, we could possibly reach a decision," App. 304.[1]

The District Court entered an amended decree incorporating all of the foregoing determinations and verdicts. Appendix hereto, pp. 14a-16a, *infra*. In pertinent summary, that decree declared that:

> 1. Hartnett, who was contributorily negligent to the extent of one per cent, should recover from Reiss and International the sum of $17,424, plus costs and interest.
>
> 2. Reiss was entitled to "full indemnity" for the foregoing amounts, plus attorneys' fees and disbursements, against *both* Grain Handling and International.
>
> 3. International and Grain Handling "are equally and jointly responsible for the payment of plaintiff's [Hartnett's] judgment, including interest and costs, and for the amount of The Reiss Steamship Company's reasonable attorneys' fees, costs, expenses and disbursements, with interest from the date of this judgment."

Only Grain Handling and International appealed from this decree. No notice of appeal was filed either by Hartnett or by Reiss. The Second Circuit affirmed the judgment below "in all respects."

As to the questions raised by Grain Handling in the instant petition, the Second Circuit ruled (1) that the District Court had correctly held that Reiss was entitled to indemnity against Grain Handling as a matter of law, without submitting to the jury Grain Han-

[1] In addition, International's claims against Reiss and Grain Handling were dismissed, as were Grain Handling's claims against International and Reiss.

dling's claim that it had not breached its warranty to the vessel, and (2) that Grain Handling was properly held liable for 50 per cent, rather than only 25 per cent, of Hartnett's recovery. With reference to the first point, the Second Circuit stated that there was nothing other than Hartnett's contributory negligence (amounting to 1%) to warrant the District Court's conclusion that Grain Handling had breached its warranty as a matter of law, although there was other evidence in the record that might have been relied upon—presumably by a jury—in determining that Grain Handling was at least jointly responsible for the unsafe conditions on board the vessel.[2] See Appendix hereto, pp. 9a-12a, *infra*.

REASONS FOR GRANTING THE WRIT

The Second Circuit has conceded that its application of "the eccentricities of the law in this area" of indemnity has produced, at least "at first blush," what arguably is "an irrational result." Appendix, p. 11a, *infra*. "[I]t does seem strange," said the court, "that conduct by a Grain Handling employee which deviated only minimally (1%) from the norm should subject his employer to potentially full liability."

[2] The Second Circuit stated that Grain Handling was not "an innocent bystander" inasmuch as there was testimony "indicating that Grain Handling was at the very least jointly responsible for the correct placing of the ladder in the hold, that another of its employees, gang boss McLaughlin, was supposed to inspect the hold for unsafe conditions and that he did not even go aboard the *Reiss* the morning of the accident." Appendix hereto, p. 11a, *infra*. As to Grain Handling's argument that it had no duty to inspect, the Second Circuit in footnote 4 of its opinion responded that the issue "was not submitted to the jury, but on these facts, where the unloading operation had started the day before, Grain Handling's position would not seem persuasive." *Ibid.*

While the Second Circuit satisfied itself that "the end result here is perfectly rational," that conclusion is far from self-evident. Indeed, irrationality and arbitrariness would seem to abound in both the reasoning used and the conclusions reached, creating serious inroads upon the Seventh Amendment's guarantee of the right to a jury trial in federal courts. In that context, the issues stemming from the decision are important, recurring and worthy of this Court's attention.

I.

The court below held that its prior decision in *McLaughlin* v. *Trelleborgs Angfartygs A B*, 408 F.2d 1334 (2nd Cir. 1969), cert. denied, 395 U.S. 946 (1969), was conclusive as to the propriety of the District Court's determination that, as a matter of law, petitioner had breached its warranty as a stevedore of workmanlike service. That breach consisted of the minimal contributory negligence of petitioner's injured employee, found by the jury to amount to one percent. This determination of the Second Circuit, which reflects and incorporates its earlier *McLaughlin* decision, creates several critical problems in federal maritime law that warrant review by this Court.

The basic problem involves a denial of the petitioner's right to a jury determination as to whether there was a breach of the warranty of workmanlike service. The evidence bearing upon such a breach is for the jury to consider and resolve. See *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U.S. 563, 568 (1958); *Atlantic and Gulf Stevedores, Inc.* v. *Ellerman Lines*, 369 U.S. 355 (1962); *International Terminal Co.* v. *N.V. Nederl. Amerik Stoomv. Maats*, 393 U.S. 74 (1968). But the court below reasoned that

the jury need not perform that function when there is the slightest basis for finding a breach as a matter of law. The questionable assumption underlying that determination is that this Court's ruling in *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U.S. 315 (1964), can be interpreted and applied so as to create a warranty in terms of non-negligent personnel and thus to create a breach thereof by virtue of the injured employee's own contributory negligence. See *McLaughlin*, 408 F.2d at 1337.

The *McLaughlin* decision, incorporated below, recognized that the *Italia* ruling gave an affirmative answer to the issue whether the warranty of workmanlike service "is breached where the stevedore has non-negligently supplied defective equipment which injures one of its employees during the course of stevedoring operations." 376 U.S. at 315-316. But the Second Circuit found "no reason to suppose that the *Italia* doctrine applies only to material and not to human resources," and, by virtue of this Court's footnote citations of several earlier Second Circuit decisions, the *McLaughlin* opinion opined that this Court must have "considered that personnel should be treated on the same basis as rope." 408 F.2d at 1337. Hence a stevedore must be considered as warranting that it will supply a rigger or scooper or other employee "who would not in fact be negligent." 408 F.2d at 1337. Contributory negligence by the injured employee, in other words, creates a breach of that warranty as a matter of law.

Whether this Court actually meant to adopt the callous principle that "personnel should be treated on the same basis as rope" is something that can definitively be answered only by this Court. Until that question is resolved, conjecture and confusion must

run rampant in the lower courts confronted with the type of indemnity problem here involved. The opinions below in this case and in the *McLaughlin* case illustrate the type of illogic that will likely dominate this area of maritime law unless this Court provides a more rational approach to this indemnity problem. For example:

(1) Why should contributory negligence by a stevedore's employee create the basis for imposing, via indemnification, full liability on the stevedore? In *McLaughlin* the Second Circuit recognized, 408 F.2d at 1337, that "negligence is a breach of duty to others and gives rise to a right in the person injured," whereas "contributory negligence is simply a disability preventing a plaintiff from recovering." Yet the court felt no legal compunction in reversing those basic legal concepts by treating contributory negligence in the indemnity context not as a disability but as giving rise to a right of full indemnification. Nor did the court see any incongruity in shifting the entire liability for the employee's accident to the stevedore-employer solely on the basis of the employee's own negligence. Such a result would hardly seem consistent with a fair distribution of the burden of recovery for maritime injuries among those in the best position to eliminate the risk of harm.

(2) Should so minimal amount of contributory negligence (1%) do service as the basis for imposing potentially full liability on the employer of the negligent employee? The Second Circuit has here recognized the irrationality of an affirmative answer to that question. It sought to cloak the end result with rationality, however, by noting that there was other evidence in the record that indicated that Grain Handling, the

employer, was not a completely innocent bystander. But such effort to rely upon evidence that was not submitted to the jury for consideration does not overcome the plain thrust of the ruling that "Although there was ample other evidence from which a jury could have found a breach of warranty by Grain Handling, *there was nothing other than Hartnett's contributory negligence which we would say was a breach as a matter of law.*" Appendix, p. 10a, *infra*; emphasis added. Rationality that might spring from other evidence can hardly be said to infuse the sole and irrational base of decision with reasonableness. And certainly a court cannot find rationality by invading the function of the jury and resolving factual issues that were left unresolved on the record.

(3) Should lower courts be permitted to avoid the task of achieving rational results in the area of indemnification by passing the responsibility to this Court and Congress? In the *McLaughlin* opinion, 408 F.2d at 1338, the Second Circuit ascribed the eccentricities and irrationalities in this area to the efforts of the lower courts to provide "some solution for the problem stemming from *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U.S. 282 (1952)."[3] But the court did not deny that the efforts of the lower courts in this respect in turn lead to irrational results. In the opinion below, as

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[3] In *Halcyon* this Court held that there is no established right to contribution between joint tortfeasors in non-collision maritime injury cases and that until Congress acts to establish and define such a right it is not appropriate for the Court to set forth any rule of contribution in this context. While distinctions have been made, this Court has indicated no retreat from the *Halcyon* ruling. *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U.S. 315, 320-321 (1964); *Federal Marine Terminals* v. *Burnside Shipping Co.*, 394 U.S. 404, 417-418 (1969).

well as in the *McLaughlin* opinion, the court shrugged off that fact with the observation that "attempts to make it more rational should be left to the Supreme Court or Congress." Appendix, p. 11a, *infra*. There are indeed difficult problems to be resolved in this corner of maritime law, but it would appear to be the duty of the lower courts, in the first instance at least, to attempt to create rational solutions to those problems.[4] This the Second Circuit has steadfastly refused to do. See, generally, Proudfoot, "*The Tar Baby*": *Maritime Personal-Injury Indemnity Actions*, 20 Stan. L. Rev. 423 (1968).

Finally, a few words should be added as to the denial of certiorari in the *McLaughlin* case, *sub nom. Golten Marine Co.* v. *Trelleborgs Angfartygs A/B*, 395 U.S. 946 (1969, No. 1334, Oct. Term 1968). Apart from the fact that no unexplained denial of certiorari is precedent for the consideration of a petition in another case, the considerations that were advanced to support the grant of certiorari in that *McLaughlin* case were far different from those here set forth. Conflicts were alleged that may not have existed. Moreover, the amount of contributory negligence in that case was 16⅔%, as compared with the 1% in the instant proceeding, thus making the irrationality and unfairness of

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[4] Circuit Judge John R. Brown, an experienced maritime judge, wrote in *D/S Ove Skou* v. *Hebert*, 365 F.2d 341, 351, fn. 18 (5th Cir. 1966), that "Assuming . . . that in a practical way there is any practical vitality in *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U.S. 282 (1952), we do not think this outlaws for all time judicial improvisation in the accommodation of this dynamic Sieracki-Ryan-Yaka-Italia concept." The Fifth Circuit there stated that it was not undertaking to rule that "there may never be an acceptable, equitable basis for distributing the burden of a loss resulting from the operational cooperation of breaches or wrongs of several parties."

the *McLaughlin* result less sharp and obvious than here. Finally, the rendering of the Second Circuit's opinion in the instant case demonstrates what was not previously clear—that the *McLaughlin* rationale and result were not isolated or one-time phenomena. The Second Circuit, a highly respected and influential court in maritime matters, has made it plain that irrationality can be a continuing hallmark of maritime indemnification principles.

Only this Court can instill this area of maritime law with principles that are fairer and more consonant with an equitable distribution of liability for maritime injuries. As stated in the Proudfoot article, *supra*, 20 Stan. L. Rev. at 445, "the Supreme Court can do much to introduce consistency and rationality into the resolution of indemnity problems by explicitly giving voice to what has long been the underlying rationale of its decisions in this area, casting aside the fictitious contractual warranty of the stevedore, and founding its analysis on modern tort principles." Only in that way can the burden of the longshoreman's recovery be placed on the party in the best position to eliminate the risk of harm.

II

The last paragraph of the opinion below, Appendix, pp. 11a-12a, *infra*, raises additional questions of fairness in allocating the ultimate liability for maritime injuries. Such questions must necessarily rise in a vast majority of maritime indemnification proceedings, making it appropriate for this Court to consider and resolve these matters.

The problems stem from an analysis of the interresponsibilities that the jury found to exist among the

three defendants—Reiss, International and Grain Handling. The jury originally found that both Reiss and International were responsible for Hartnett's injury, thereby making each responsible for 50% of the recovery. Thereafter it was determined that Reiss was entitled to be indemnified fully by both Grain Handlers and International—who were found by the jury to be "jointly responsible" as between themselves. All claims that International had to be indemnified by either Reiss or Grain Handling for its liability to Hartnett were dismissed.

Thus, by mathematical computation which the Second Circuit termed "impeccable," Grain Handling became "jointly responsible" with International to indemnify Reiss for its half of the liability. The only conduit through which Grain Handling can be said to be responsible to pay any part of the judgment is through Reiss. And since Reiss' obligation is but 50%, Grain Handling's joint indemnification obligation can only be 25%. Indeed, under the circumstances of this case, the additional obligation that has been imposed on Grain Handling over and above this 25% actually amounts to a contribution in direct violation of the principles set forth in *Halcyon Lines* v. *Haenn Ship Corp.*, *supra*.

The Second Circuit sought to enlarge Grain Handling's indemnification obligation to 50%, as the District Court had provided, by arguing that the foregoing analysis depended upon "the vagaries of enforcement of judgments" and that such vagaries could also produce other results even more unfair to the parties. But the significant point is that the mathematical calculation of indemnification must occur at the end of a case, in accordance with the relevant jury and

court determinations, prior to the commencement of "the vagaries of enforcement of judgments." What is fair at that point is not made unfair because the plaintiff subsequently seeks or obtains satisfaction from one party rather than another. And neither court below has found or demonstrated that a 25% allocation of responsibility to Grain Handling is other than in accord with the rulings of the jury and trial court as to responsibilities.

In a similar situation, the District Court for the Eastern District of Louisiana found no difficulty in apportioning indemnification responsibilities in strict accord with the liability determinations and at a time before the judgment was subject to enforcement. *Lowe* v. *The California Company*, 296 F. Supp. 1264.[5] The same fair type of apportionment should have been followed here.

This problem of utilizing proper standards of allocating responsibility for satisfying liability in maritime injury cases needs examination and clarification by this Court.

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[5] In *Lowe*, the Court concluded as follows:

"I have found both Labor Services and Chevron jointly and severally liable to Lowe. Each must therefore respond with one-half of the settlement, or $70,000. But Chevron has been indemnified against loss by both Labor Services and Pemco, who must each contribute one-half of Chevron's liability, or $35,000. In sum, Pemco owes Lowe $35,000, while Labor Services owes him $105,000. Since Pemco and Labor Services each contributed $70,000 to the settlement, Pemco is entitled to collect $35,000 from Labor Services. It is ordered that judgment be entered accordingly."

Grain Handling's position would appear to be analogous to that of Pemco in the *Lowe* case.

CONCLUSION

For these various reasons, the judgment of the Second Circuit should be reviewed by this Court.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 193, 194—September Term, 1969.

(Argued October 31, 1969 Decided January 22, 1970.)

Docket Nos. 33611, 33612

PETER HARTNETT, *Plaintiff-Appellee;*

—against—

THE REISS STEAMSHIP COMPANY, a corporation,
Defendant-Appellee,

—and—

INTERNATIONAL MILLING COMPANY, a corporation,
Defendant-Appellant,

—against—

GRAIN HANDLING COMPANY, INC., a corporation,
Third-Party Defendant-Appellant.

Before:

MEDINA, MOORE and FEINBERG, *Circuit Judges.*

Appeal by stevedores from judgment in favor of injured longshoreman against vessel and non-employing stevedore, and judgment for vessel against both stevedores, after a jury trial before the United States District Court for the Western District of New York, John T. Curtin, *J.* Affirmed.

FENTON F. HARRISON, Buffalo, N. Y. (Harrison, Gruber & Gaughan, on the brief), *for Defendant-Appellant International Milling Company.*

EVAN E. JAMES, Buffalo, N. Y. (Joseph M. Soviero, on the brief), *for the Third Party Defendant-Appellant Grain Handling Company, Inc.*

RAYMOND J. MCNAMARA, Buffalo, N. Y. (McNamara & Fithenry, on the brief), *for Plaintiff-Appellee Peter Hartnett.*

THOMAS O. MURPHY, Cleveland, Ohio (Johnson, Branand & Jaeger, John T. Jaeger, Cleveland, Ohio; Phillips, Lytle, Hitchcock, Blaine & Huber, Robert M. Hitchcock, Buffalo, N. Y., on the brief), *for Defendant-Appellee The Reiss Steamship Company.*

FEINBERG, *Circuit Judge*:

Out of a simple accident in 1964 aboard the William A. Reiss has come an unusually complicated case. Injured in the accident was plaintiff Peter Hartnett, a longshoreman employed by Grain Handling Company, Inc. Plaintiff sued both The Reiss Steamship Company, the owner of the vessel, and International Milling Company, a company involved in unloading the ship. Reiss impleaded plaintiff's employer, Grain Handling, a third-party defendant; Grain Handling and the two original defendants all made various claims against each other. The trial was held before John T. Curtin, *J.* and a jury in the United States District Court for the Western District of New York. In the first phase of the trial, plaintiff was awarded judgment against defendant Reiss for unseaworthiness and against defendant International for negligence in the sum of $17,424, representing plaintiff's damages diminished by his one per cent contributory negligence found by the jury. At this point, the trial judge proceeded to the various remaining claims. On claims for indemnity by shopowner Reiss, he found that International was a stevedore as a matter of law, but submitted to the jury the issue whether Reiss had prevented International from fulfilling its warranty to Reiss of workmanlike performance; the judge ruled as a matter of law

that Reiss was entitled to indemnity from Grain Handling. He then also submitted to the jury the liability of Grain Handling and International to each other on their cross-claims. The jury found Reiss entitled to be indemnified by International and found Grain Handling and International "jointly responsible" as between themselves.

Both plaintiff Hartnett and shipowner Reiss are apparently satisfied with the judgment below, since neither appeals. International and Grain Handling do appeal, however, and raise a number of contentions. We have considered them all; we affirm the judgment of the district court which held International and Grain Handling equally liable, on this record an obviously sensible result.

I.

The William A. Reiss carried a cargo of grain for International from Duluth, Minnesota, to Buffalo, New York. When the vessel arrived in Buffalo, it docked beside International's grain elevator, where the latter directed location of the mooring and the opening of the hatches for the discharge of grain. The unloading was done initially by use of a mechanical "leg," essentially a series of buckets on an endless belt which scoop up the grain; the leg was lowered from the elevator into the grain in the hold and carried the grain into a tower. An International employee, called a leg man, supervised the unloading operation into the tower from aboard the vessel. When the grain in the hold reached too low a level, it became necessary to send other men, called scoopers, into the hold to move the grain by use of mechanical shoveling equipment to within the reach of the mechanical leg. The scoopers, including plaintiff, were longshoremen employed by Grain Handling. Evidently, the custom of the port is that Grain Handling supplies the men on a port-wide basis, and the elevator (in this case, International) supplies the machinery and equipment necessary for this task at the site.

The accident to plaintiff occurred on the morning of November 26, 1964. On the previous day during a heavy rain, Grain Handling scoopers had emptied all but one corner of the hold where the accident occurred. When the scoopers left the hold, it was necessary to use a small portable ladder to get to the ship's starboard bulkhead ladder, which, like its counterpart on the port side, ended some distance above the deck of the hold. The next morning International made the decision to continue the unloading despite the rainfall, which apparently was continuing. Grain Handling's gang boss, whose job included inspecting the ship for unsafe conditions, did not go aboard the vessel that morning. Plaintiff was the first employee to enter the hold. Receiving no instructions to the contrary, and evidently forgetting the location of the portable ladder, he descended the port side bulkhead ladder, lost his footing on the last rung, fell into a puddle of grain and water, attempted to rise and fell again, and thus sustained the injuries in suit.

II. Claims of International

Appellants International and Grain Handling advance a number of claims, some addressed to their liability vis-à-vis plaintiff or the ship, and some addressed to the judgment holding them equally liable. We deal with the claims of International first.

Claims relating to plaintiff

As already indicated, the issues in the case were sensibly decided in two steps. The first step resulted in a verdict for plaintiff against the vessel for unseaworthiness and against International for negligence.[1] International claims that (1) since it had not responsibility for the absence of a portable ladder at the foot of the bulkhead ladder, it

[1] The trial judge dismissed a negligence claim against the ship and an unseaworthiness claim against International.

was error to instruct the jury that this was a possible basis of negligence; (2) plaintiff failed to prove that it was negligence to unload in the rain; (3) even if it was, plaintiff failed to prove that his accident was proximately caused thereby; and (4) plaintiff suffered no real loss of wages because of money he received from a wage pool explained below.

As to International's first contention, the jury could have concluded from the evidence before it that International's employees waited for the vessel on the dock, directed its mooring, furnished the mechanical conveyors, all of the power and equipment, including the misplaced portable ladder, directed the opening and closing of the vessel's hatches and the movement of the vessel along the elevator dock, and generally—with labor furnished by Grain Handling for work in the hold—supervised the unloading of the vessel. Under those circumstances, the jury could properly find that a substantial share of the responsibility for the absence of the ladder belonged to International.

As to contention (2), International concedes that a jury could properly hold it responsible for unloading in the rain but argues that there was no proof that this was negligent, and that the court neither defined negligence nor explained plaintiff's burden of proof. These claims are simply not borne out by the record. The judge did define negligence and did set forth plaintiff's burden. In addition, there was evidence that on the morning of the accident it was raining, that the vessel's mate and International's deck boss discussed whether the hatches should be opened for unloading during the rain, and that International said to go ahead. The jury could have inferred from this that unloading in the rain, in these circumstances, was sufficiently risky so that it was necessary to consider the question, but that International went ahead despite the risk. We cannot say that as a matter of law this was not negligent.

International's contention (3) is that it was not reasonably foreseeable that rain water would accumulate in the hold, that neither plaintiff's employer, Grain Handling, nor the vessel would inspect the hold or correct the condition, as they allegedly should have, and that plaintiff would descend and break his leg as he did. While International cites impressive precedents, e.g., *Palsgraf* v. *Long Island Ry.*, 248 N.Y. 339 (1928), they are inapposite. It seems clear that plaintiff was within the zone of danger caused by unloading the ship in the rain; there is nothing here so bizarre as the events leading up to the injury in *Palsgraf*. If unloading in the rain was negligent at all, as the jury was entitled to conclude it was, then it was negligent with respect to the longshoremen working in the hold, since that would be one of the logical places where sloppy conditions or an accumulation of water might be expected. Moreover, once International negligently created the dangerous condition in the hold, it ought to have foreseen the type of accident that did occur. The negligent failure of other persons to correct the dangerous condition was not sufficient to insulate International's negligence from being the proximate cause of plaintiff's injury, particularly since the continuation of the dangerous condition was due as much to International's failure to inspect the hold as to Grain Handling's.[2]

International's argument (4) is that plaintiff suffered no damage from loss of wages because he received payment from a wage pool, which apparently operated as follows: The employees of Grain Handling were paid on a per-ship basis, rather than on an hourly or individual piece-work system, the total payment being divided among the employees on a particular crew; if a member of a crew be-

[2] In connection with all of the foregoing complaints of International about liability for its own negligence, it should be pointed out that in this court no one challenges the jury finding that the William A. Reiss was unseaworthy. Given this, International is also liable as an indemnitor, as more fully discussed below.

came incapacitated through injury, he continued to receive his wages from the pool, and the other members of the team took up the slack and unloaded the ship with fewer men. International's argument is based on the assumption that New York law, and in particular *Drinkwater* v. *Dinsmore*, 80 N.Y. 390 (1880), governs this case. Apart from the question whether in this action in admiralty for maritime tort New York law would be relevant, cf. *Pope & Talbot* v. *Hawn*, 346 U.S. 406 (1953),[3] the *Drinkwater* rule itself is applicable today only to gratuitous payments, not to those which arise out of contract, such as insurance. See *Cunningham* v. *Rederiet Vindeggen A/S*, 333 F.2d 308, 316-17 (2d Cir. 1964). The arrangement here was essentially a form of insurance contract, albeit an informal one; we see no reason why it should be accorded different treatment for more formal arrangements.

International's other claims

International also raises several questions concerning its liability to the ship for breach of warranty of workmanlike performance. First, International claims that the trial judge erred in holding it to be a stevedore as a matter of law. Its argument stems from its dual capacity. It owns and operates the Lake and Rail Elevator, but it is also a flour milling concern and, as such, was the owner, shipper, and consignee of the cargo being unloaded. International contends that by means of its mechanical leg, it was merely accepting delivery of the cargo in its latter capacity, and was not engaged in unloading the ship with the Elevator's mechanical equipment. The argument does not persuade us. We feel that the concept of stevedore should embrace anyone who by his acts can create—or avoid the creation of—those special risks which justify holding a stevedore to a

[3] The general rule in the federal courts is that the collateral source rule is applied and defendants cannot show payments of this kind in mitigation. See *Gypsum Carrier, Inc.* v. *Handelsman*, 307 F. 2d 525 (9th Cir. 1962).

warranty of super-carefulness to a ship, whose own liability to injured workers approaches strict liability. International was engaged in operating unloading machinery—the leg—inside the hold of the ship; more importantly, in order to operate the mechinery it was necessarily in partial control of the ship. These actions carried with it a concomitant duty to exercise that control so as to protect the ship and those who must be exposed to the hazards of the work. In other words, it is the act of unloading and International cannot deny that it was engaged in moving grain from the hold onto land—rather than either the means of unloading or the ownership of the grain that is crucial to a determination whether the person doing the act is a "stevedore." For the same reason, in the absence of an express contractual provision shifting responsibility for the conduct of the unloading, it is irrelevant whether Reiss initially contracted with International to unload the grain and subsequently paid International to do so or whether the contract rate for carriage of the grain, as initially set, assumed that International would unload the grain. It is the act of unloading and the fact that International undertook to do this for the ship which determines whether a warranty of workmanlike performance should be implied in the contract between them.

International also complains of the dismissal of its cross-claim against Reiss. However, since International was properly held to be a stevedore, the dismissal was correct. A shipowner's recovery from a stevedore for breach of warranty is *not* affected even by the ship's own negligence, unless the ship prevented or seriously hampered the stevedore in performing its warranty of workmanlike service, which the jury quite properly found did not occur. See *Weyerhaeuser S.S. Co.* v. *Nacirema*, 355 U.S. 563 (1958).

International's final claim is based on the fact that it did its "stevedoring" in conjunction with Grain Handling, admittedly a stevedore. Thus, International argues that it is

the third-party beneficiary of Grain Handling's warranty of workmanlike service to Reiss, upon the principles we set forth in *Williams v. Pennsylvania R.R.*, 313 F.2d 203 (2d Cir. 1963). In that case, Wm. Spencer & Son Corporation had been engaged by the Lehigh Valley Railroad to unload a Lehigh barge. The Lehigh had also obtained a floating crane and its operator from the Pennsylvania Railroad Company to be used in the unloading under Spencer's direction. The negligent operation of the crane under the general supervision of Spencer caused an injury to one of Spencer's employees, John H. Williams, while he was unloading the barge. Williams sued the Pennsylvania and recovered $2,500. The Pennsylvania asserted a third-party claim against Spencer, which we upheld. International claims that the activities of the Pennsylvania and Spencer in that case resemble those of International and Grain Handling here, so that International should, like the Pennsylvania, get the benefit of a warranty by a stevedore (Grain Handling) to the vessel. But the unloading operation in *Williams* was controlled by Spencer and was not under the overall direction of the Pennsylvania. Here supervision of the unloading was in the hands of International, at least in substantial part. Under the circumstances, we do not think it appropriate here to extend the warranty to a vessel of one stevedore (Grain Handling) to benefit a co-stevedore (International). Moreover, if International was the beneficiary of such a warranty, then Grain Handling was equally the beneficiary of a warranty from International, which was also breached. While this might in fact be a way of resolving the liabilities of Grain Handling and International between themselves, we prefer to do so on another ground, to which we shall return.

II. Claims of Grain Handling

We turn now to the arguments of Grain Handling, which presses two claims regarding the judgment in favor of plaintiff Hartnett. The first is the impropriety of allowing

plaintiff's loss of wages; we have already disposed of that contention. The second is that the finding that plaintiff was only one per cent contributorily negligent was against the weight of the evidence. This claim is also without any merit. On these facts, it was within the province of the jury to find that Harnett's fault was minor in the extreme.

Grain Handling next argues that it should have been allowed to submit to the jury its claim that it did not breach its warranty to the vessel. Grain Handling relies on *International Terminal Operating Co.* v. *N.V. Nederl. Amerk. Stoomv. Maats.*, 393 U.S. 74 (1968). In that case, this court reversed a jury verdict holding a stevedore blameless, and held the stevedore's conduct unreasonable as a matter of law. 392 F.2d 763. The Supreme Court reversed and held that the issue was for the jury under the Seventh Amendment. The trial judge in this case granted Reiss indemnity from Grain Handling as a matter of law. Reiss argues to us that this was correct because the jury's finding that Hartnett had been contributorily negligent was conclusive as to his employer's breach of warranty. Although there was ample other evidence from which a jury could have found a breach of warranty by Grain Handling, there was nothing other than Hartnett's contributory negligence which we would say was a breach as a matter of law.

We believe that disposition of this point is controlled by our recent decision in *McLaughlin* v. *Frelleborgs Angfartygs A/B*, 408 F.2d 1334 (2d Cir.), cert. denied, 395 U.S. 946 (1969). We there held that a stevedore warranted employees who would in fact not be negligent, and thus that a jury finding that a stevedore's employee (the plaintiff) was contributorily negligent conclusively determined the stevedore's breach of warranty. We pointed out that unlike the situation in *International Terminal Operating Co., supra*, we were implementing rather than disturbing the jury verdict. We also distinguished an earlier line of cases in this circuit, typified by *Calderola* v. *Cunard S.S. Co.*, 279 F.2d

475 (2d Cir.), cert. denied, 364 U.S. 884 (1960), and *Orlando v. Prudential S.S. Co.*, 313 F.2d 822 (2d Cir. 1963), both of which are relied on by Grain Handling here.

The argument was made in *McLaughlin* that mechanical application of the rules of indemnity led there to an irrational result. At first blush, the same claim might be made here; it does seem strange that conduct by a Grain Handling employee which dviated only minimally (1%) from the norm should subject his employer to potentially full liability. To this argument, it might be enough to recall that the eccentricities of the law in this area were explored thoroughly in *McLaughlin*, where we concluded that attempts to make it more rational should be left to the Supreme Court or Congress. 408 F.2d at 1338. But it is more satisfying to point out that the end result here is perfectly rational, even if some of the intermediate steps seem arbitrary. Grain Handling was not an innocent bystander suddenly saddled with immense liability because of a peccadillo by its employee, plaintiff Hartnett. There was testimony indicating that Grain Handling was at the very least jointly responsible for the correct placing of the ladder in the hold, that another of its employees, gang boss McLaughlin, was supposed to inspect the hold for unsafe conditions and that he did not even go aboard the *Reiss* the morning of the accident.[4] However tempted we might otherwise be to reexamine the implications of a finding of contributory negligence in such a minor degree, we find it easy to resist the temptation here.

This brings us to the last of Grain Handling's arguments. The final decree below, on the basis of a jury finding of joint responsibility, divided the ultimate liability for the amount of plaintiff Hartnett's recovery equally between

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[4] Grain Handling argues that it had no obligation to inspect. The issue was not submitted to the jury, but on these facts, where the unloading operation had started the day before, Grain Handling's position would not seem persuasive.

Grain Handling and International. Grain Handling contends that it should be liable only for 25, not 50, per cent of plaintiff's recovery, because Reiss and International, as original defendants, were both independently liable to plaintiff and because Grain Handling's obligation is only to bear equally with International the burden of satisfying Reiss. Grain Handling's mathematics is impeccable; one-half of one-half is indeed one-fourth. But we think that what the trial judge did was correct. The apportionment that Grain Handling seeks would occur only through the vagaries of enforcement of judgments, which could also produce results even more unfair to the parties—for example, International, as an original defendant, might bear the full brunt of plaintiff's judgment if he proceeded against it for the entire amount in the first instance. But the trial judge here submitted to the jury the question of the responsibility of Grain Handling and International to each other, and the jury found them jointly responsible. It was correct to implement this finding by decreeing that each should bear half of the ultimate liability.

Accordingly, we affirm the judgment below in all respects.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of January one thousand nine hundred and seventy.

Present: Hon. Harold R. Medina, Hon. Leonard P. Moore, Hon. Wilfred Feinberg, *Circuit Judges.*

Peter Hartnett, *Plaintiff-Appellee,*

v.

The Reiss Steamship Company, *Defendant,*

International Milling Co., *Defendant-Appellant,*

Grain Handling Company, Inc., *Third-Party-Defendant-Appellant.*

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellants.

A. Daniel Fusaro,
Clerk

Amended Decree

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NEW YORK

PETER HARTNETT, *Plaintiff*,

v.

THE REISS STEAMSHIP COMPANY, a corporation,

and

INTERNATIONAL MILLING COMPANY, a corporation,
Defendants,

v.

GRAIN HANDLING COMPANY, INC., a corporation,
Third Party Defendant.

Civil Action No. 11,875.

This cause having come on for trial before a jury on December 10, 11, 12 and 13, 1968; and the jury having returned a verdict for plaintiff in the amount of $17,600.00 against defendant The Reiss Steamship Company on the basis of unseaworthiness and against defendant International Milling Company on the basis of negligence; and the jury having concluded that plaintiff was contributorily negligent to the extent of one per cent (1%); and the Court having directed that defendant The Reiss Steamship Company is entitled to full indemnity from third party defendant Grain Handling Company, Inc. as a matter of law; and the jury having returned a verdict in favor of defendant The Reiss Steamship Company on its cross-claim for full indemnity from defendant International Milling Company; and the jury having returned a verdict that defendant International Milling Company and third party defendant Grain Handling Company, Inc. were jointly responsible with respect to their cross-claims against each other;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Peter Hartnett recover from International Milling Company and

The Reiss Steamship Company the sum of $17,424.00 and costs, with interest at 6% from the date of this decree; and

It Is Hereby Further Ordered, Adjudged and Decreed that The Reiss Steamship Company recover on its third party complaint against Grain Handling Company, Inc. full indemnity for the amount which The Reiss Steamship Company is required to pay to plaintiff, together with reasonable attorneys' fees, costs, expenses and disbursements; and

It Is Hereby Further Ordered, Adjudged and Decreed that The Reiss Steamship Company recover on its cross-claim against International Milling Company for indemnity for the amount which The Reiss Steamship Company is required to pay to plaintiff, together with reasonable attorneys' fees, costs, expenses and disbursements; and

It Is Hereby Further Ordered, Adjudged and Decreed that International Milling Company and Grain Handling Company, Inc. are equally and jointly responsible for the amount of plaintiff's judgment, including interest and costs, and for the amount of The Reiss Steamship Company's reasonable attorneys' fees, costs, expenses and disbursements, with interest from the date of this judgment; and

It Is Hereby Further Ordered, Adjudged and Decreed that the complaint of Peter Hartnett against The Reiss Steamship Company based upon negligence, the complaint of Peter Hartnett against International Milling Company based upon unseaworthiness, the cross-claim of International Milling Company against The Reiss Steamship Company; the cross-claim and or counter-claim of Grain Handling Company, Inc. against The Reiss Steamship Company, the cross-claim of Grain Handling Company, Inc. against International Milling Company, and the cross-claim of International Milling Company against Grain Handling Company, Inc. be, and the same hereby are dismissed with prejudice in each instance; and

It Is Hereby Further Ordered, Adjudged and Decreed that, if the parties cannot agree within sixty days to the

amount to which The Reiss Steamship Company is entitled by way of recovery of reasonable attorneys' fees, costs, expenses and disbursements, the matter then shall be referred to this Court for such further consideration as the Court may direct.

JOHN T. CURTIN,
United States District Judge.

Dated: February 13, 1969.